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No. 84-1529

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES,
Petitioner,

v.

AMERICAN HOSPITAL ASSOCIATION, *et al.*,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF GEORGE P. SMITH, II, CATHOLIC UNIVERSITY SCHOOL OF LAW

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BRIEF AMICUS CURIAE OF GEORGE P. SMITH, II, CATHOLIC UNIVERSITY SCHOOL OF LAW

This brief is filed with the writen consent of the parties; the consents are lodged with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The *amicus curiae* is a widely regarded teacher and scholar in the field of Health Law – having begun his study and writing in 1968.[1] As Faculty Editor-in-Chief of

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[1]Smith, Through A Test Tube Darkly: Artificial Insemination and The Law, 67 MICH. L. REV. 127 (1968); cited in *Roe v. Wade*, 410 U.S. 113, 161 (1973), per Blackmun, J.

The Journal of Contemporary Health Law and Policy, published by The Catholic Univesity Law School in Washington, D.C., and as an international lecturer who – among other appointments – has been a Fulbright Visiting Professor of Law and Medical Jurisprudence at the University of New South Wales in Sydney, Australia, in 1984, and in such capacity lectured throughout the Continent of Australia on matters of current Health Law, the *amicus* has established a record of both vital concern and commitment to not only promoting and maintaining the public welfare through the maintenance of high professional standards, but the continued development and assurance of quality health care for all citizens – regardless of their mental or physical condition.

The interest of the *amicus curiae* is not in extending the philosophical, ethical, moral or religious debate surrounding the central issue of qualify of life *versus* sanctity of creation. Rather, his interest is in placing these issues and concerns, where appropriate, within a full and objective framework for principled analysis; a framework that first and foremost embodies a recognition of the extent to which a balance is maintained between the state and the federal government's obligation to protect all of its citizens from abuse or discrimination regardless of age or physical weakness. And, furthermore, a framework that recognizes any intrusion into familial privacy must be tied either to a standard of reasonableness or what is in the best interests of the particular handicapped individual.

The outcome of this case will directly affect and, indeed, shape the future of the law for handicapped individuals of all ages by clarifying the extent to which the most significant civil right of all – the right to life – is assured for individuals born with a handicap. Thus, it is of critical

importance to those scholars and teachers who specialize in the field and who – as such – analyze, interpret, assist and chart new directions of needed law reform, that an academic perspective be presented here.

For these reasons, the *amicus* wishes respectfuly to present his views regarding the complex issues raised by the regulations and interpretative guidelines for handicapped newborns published January 12,1984, by Margaret M. Heckler, Secretary of the United States Department of Health and Human Services, under the alleged authority of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794.

SUMMARY OF ARGUMENT

The *amicus curiae* submits this brief in support of the American Hospital Association, et al., Respondents.

Congress enacted the Rehabilitation Act of 1973 and the subsequent amendments in order to foster vocational rehabilitation programs and encourage integration of handicapped individuals into the work force. To the extent that employment goals were to be supervised, Congress intended Section 504 of the Act as but a broad mandate to allow *access* for handicapped individuals to all federally funded programs and institutions. Furthermore, Congress did not intend to impose an affirmative action obligation on all recipients of federal funds beyond that of non-discrimination on the basis of handicap.

Nowhere in the Rehabilitation Act, itself, nor in its legislative history, is there either a reflection or a specific Congressional mandate for the United States Department of Health and Human Services – or any other Depart-

ment – to intrude into the familial decision making process or contravene medical care decisions which parents make for their newborn, albeit handicapped, infants. The Department, however, seeks to utilize Section 504 of this Act as a vehicle for intervention in health care decision making within the family by its promulgation of implementing regulations and interpretative guidelines. These actions are totally inconsistent with the stated purpose of the Act as articulated by Congress and interpreted by the Courts. Thus, they should be considered as *ultra vires.*

Consistent with long cherised principles of Federalism, Congress and the individual states have already acted with purpose and resolve in addressing the very issue of child protection that these presently contested federal regulations do; this action they have taken through the promotion and enactment of Child Abuse Prevention and Protection Acts. This body of law is sufficient to deal with the very problems that the United States Department of Health and Human Services seeks to rectify with these federal regulations.

Finally, the promulgation of these contested Section 504 regulations and interpretative guidelines intrudes directly into the familial right of privacy to not only be left alone in making reasonable judgments regarding the health of their children but to an entitlement to withhold information regarding the bases for these judgments.

ARGUMENT

I. THE CONGRESSIONAL PURPOSE OF THE 1973 REHABILITATION ACT DOES NOT EXTEND BEYOND THE VOCATIONAL AND EMPLOYMENT GOALS THAT CONGRESS SET FORTH.

Citing the failure of the basic vocational rehabilitation programs to respond to the needs of handicapped individuals and the lack of alternative services within communities to assist these individuals, Congress set forth corrective legislation in what became the 1973 Rehabilitation Act.[2] This Act was enacted as Public Law 93-112, 87 Stat. 355, to provide a statutory basis for the Rehabilitation Services Administration and to authorize programs of various kinds to benefit handicapped individuals.[3]

Congress declared the purpose of the 1973 Rehabilitation Act to be one of providing for vocational rehabilitation services to handicapped individuals. Accordingly, the Rehabilitation Services Administration was empowered to conduct surveys and to develop methods for providing rehabilitative services – including assistance in construction of facilities, in order to meet the present and future vocational needs of these individuals.[4] To the extent that the Congressional purpose was to extend further, and into the area of medicine, the mandate was simply to:

> ". . . develop and implement, through research, training, services, and the guarantee of equal opportunity, comprehensive and coordinated pro-

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[2] S. REP. NO. 93-318, 93rd CONG., 1ST SESS., reprinted in 1973 U.S. CODE CONG. & AD. NEWS 2076, 2075.

[3] *Id.*

[4] 29 U.S.C. § 720a (1982).

grams of vocational rehabilitation and independent living."[5]

There can be no question of the clarity of the Congressional intent: to promote the development of technology to such an extent that the resources available to the handicapped would increase and in turn foster employment opportunities for them. Nowhere in the Act nor in its history is to be found a mandate by Congress requiring handicapped individuals to partake in that which is being made accessible to them. Moreover, at no place in the Act does Congress suggest any sort of intervention into medical decision making. The express goals of Congress were broad only insofar as vocational rehabilitation for the handicapped individuals were concerned. It was understood, implicitly, that handicapped individuals would in due course avail themselves of these facilities and programs. Yet, in order for this opportunity to be protected, Congress found it necessary to provide for these very same individuals a private cause of action under which their rights could be asserted. Section 504 of The Rehabilitation Act has been construed consistently as the vehicle by which a handicapped person may require federally funded programs and institutions to be made accessible to them.[6]

A. IN FURTHERANCE OF THE VOCATIONAL GOALS OF THIS ACT, CONGRESS INTENDED SECTION 504 TO PROVIDE ABSOLUTE ACCESS FOR HANDICAPPED INDIVIDUALS TO ALL FEDERALLY FUNDED PROGRAMS AND INSTITUTIONS BY PROVIDING A PRIVATE CAUSE OF ACTION.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, constituted the establishment of a broad govern-

[5]29 U.S.C. § 701 (1982).

[6]Lau v. Nichols, 414 U.S. 563 (1974).

mental policy that programs receiving federal financial assistance should be operated without discrimination on the basis of handicap.[7] This language is patterned after the comparable provisions of the Civil Rights Act of 1962, 42 U.S.C. § 2000d and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681. The Statute was amended in 1978 in order to extend the benefits of Section 504 to handicapped individuals under any program or activity conducted by an executive agency or by the United States Postal Service and to require each such agency to promulgate regulations made necessary to carry out the amendments thereto.[8]

The courts have construed Section 504 of the Rehabilitation Act of 1973 consistently as having conferred on those persons intended to be protected affirmative rights that – by implication – may be vindicated by maintenance of a private cause of action.[9]

This court has already spoken to the need for clear guidelines limiting private causes of action when a statute so provides. In *Court v. Ash,* 422 U.S. 66 (1975), this Court decided that regulations implementing a statute that is intended to provide a private cause of action in persons intended to be covered thereby must be limited. The decision in *Court,* outlines four basic questions to be posited when reviewing such implementing regulations:

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[7]Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977).

[8]Rehabilitation, Comprehensive Services & Developmental Disabilities Act of 1978, Pub. L. 95-602, 92 Stat. 2982, codified as 29 U.S.C. § 701 et seq. (1982).

[9]See e.g., Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977); United Handicapped Federation v. Andre, 558 F.2d 413 (8th Cir.1977).

> "First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted'; Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one; Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff; and . . . Fourth, is the cause of action one traditionally relegated to state law in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?"[10]

In this present appeal, the petitioner is not one of the class for whose especial benefit the Rehabilitation Act of 1973 was enacted. Neither the handicapped individual nor the parents involved in this appeal seek any type of redress. Indeed, in both cases below, the United States Secretary of Health and Human Services sought to initiate action – clearly a plaintiff not contemplated as such in the class. Had the parents sought and been denied access to the hospital in the instant case, they would have clearly been within the class of plaintiffs contemplated to seek remedial action bsed on the Rehabilitation Act – but, again, not the Department of Health and Human Services.

As to the second *Ash* question, nowhere in the congressional history of the Rehabilitation Act of 1973 can be discerned a legislative intent for the creation of the remedy sought herein. The HHS regulations are overbroad and intrusive insofar as the medical decision making process is concerned. Moreover, the facts in this instant case demonstrate that the facilities of the hospitals in question were at all times accessible to everyone. That the parents decided

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[10]422 U.S. 66, 78 (1975).

not to use the federally funded facilities as available is a wholly separate issue that does not implicate the hospital, itself, or its "discrimination" on the basis of handicap. The legislative intent of Section 504 calls for absolute *access* to federally funded programs. It does not extend to the remedy of federal intervention by way of HHS regulations abrogating the rights of parents in medical decision making.[11]

Applying the third *Ash* question to the present appeal, it is seen that the questioned regulations issued under the grant of Section 504 of the Rehabilitation Act of 1973 are inconsistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiffs. Forced federal intrusion into the family decision making process goes beyond facilitating a private cause of action for the families.[12]

Finally, testing the fourth *Ash* factor or question with the facts of this present appeal, it is seen clearly that the cause of action here is one that is traditionally relegated to state law in an area basically the concern of the state as is obvious from the long history of attention paid by them to the problem of child abuse and prevention.[13] Indeed, each of the fifty states and the District of Columbia has enacted legislation designed specifically to provide for a duty to report and a remedy to investigate, take custody and pro-

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[11]See e.g., 45 C.F.R. 84.55(f)(3)(D).

[12]See generally, 45 C.F.R. 84.55.

[13]See 45 C.F.R. 84.55(b)(5).

secute when necessary incidents of child abuse occur.[14] Should denial of consent by parents rise to the level of child abuse or neglect, the provisions of these laws are strong enough to deal with the problem.[15] Moreover, the HHS regulations at issue in this case refer to the existence of this body of jurisprudence and attempt to, in essence, duplicate all the work that has been done and is being done

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[14]Ala.Code §§26-15-1-26-15-4 (1975); Alaska Stat. §47.10.010 (1962); Ariz.Rev.Stat.Ann. §13.3673 (1956); Ark.Stat.Ann. §42-807 (1977); Cal.Penal Code §11165 (West 1980), Colo.Rev.Stat. §18-6-401 (1973); Conn.Gen.Stat. §53-20 (1949); Del.Code Ann.tit. 31, §301 (1974); D.C.CodeAnn. §6-2101 (1981); Fla.Stat. §827.07 (1981); A.CodeAnn. §74-111 (1933); Hawaii Rev.Stat. §350-1 (1976); IdahoCode §16-1601 (1949); Ill.Rev.Stat.ch.23, §2368 (1977); Ind.Code Ann. §31-6-11-1 (Burns 1980); IowaCode §235 (1979); Kan.Stat.Ann. §38-704 (1965); Ky.Rev.Stat. §15-900 (1984); La.Rev.Stat.Ann. §14.93 (West 1970); Me.Rev.Stat.Ann.tit. 19 §218 (1964); Md.Pub. Safety Code Ann. §35A (1973); Mass.Gen.Laws Ann.ch. 273 §1 (West 1975); Mich.Comp.Laws Ann. §722.622 (West 1983); Minn.Stat.Ann. §626.556 (West 1962); Miss.Code Ann. §43.19.1 (1972); Mo.Rev.Stat. §210.110 - 210.165 (1982); Mont.Code Ann. §10-503 (1977); Neb.Rev.Stat. §28-707 (1979); Nev.Rev.Stat. §§200.501 - 200.509 (1973); N.H.Rev.Stat.Ann. §169.38 (1955); N.J.Stat.Ann. §26.24-4 (West 1982); N.M.Stat.Ann. §30-6-1(c) (1978); N.Y.Social Services Law §412 (McKinney 1983); N.C.Gen.Stat. §14-318.2 (1981); N.D.Cent.Code §50-25.1-02 (1982); Ohio Rev CodeAnn. §29.1922 (1982); Okla.Stat.Ann.tit.21 §843 (West 1983); Or.Rev.Stat. §418.770 (1983); Pa.Stat.Ann.tit.11 §23 (Purdon 1965); R.I.Gen.Laws §40-11-2 (1956); S.C.CodeAnn. §20-7-10 (Law.Co-op 1976); S.D.Codified Laws Ann. §26-10-10 (1984); Tenn.CodeAnn. §37-1200 (1977); Tex. Family Code Ann. §35.04 (Vernon 1975); Utah Code Ann. §76-5-109 (1953); Vt.Stat.Ann.tit.13 §2801 (1974); Va.Code §63.1.248 (1950); Wash.Rev.Code §26.44.020 (1974); W.Va.Code §49-1-3 (1980); Wis.Stat.Ann. §940.201 (West 1982); Wyo.Stat. §6-4-504 (1977).

[15]*Id.* See Smith, Long Days Journeys Into Night: The Tragedy of The Handicapped At Risk Infants, in MORAL ISSUES IN MENTAL RETARDATION Ch. 8, (R.Laura, ed. 1984).

at the state levels.[16] Thus, these HHS regulations are not only unnecessary and duplicative of what is presently being done, but are beyond the scope of what has been intended by Congress and, thus, *ultra vires.*

B. THE HHS REGULATIONS IMPOSE AN AFFIRMATIVE ACTION OBLIGATION ON RECIPIENTS OF FEDERAL FUNDS BEYOND THE SCOPE OF WHAT CONGRESS INTENDED FOR SECTION 504.

The legislative interpretation of the mandate of Section 504 is difficult to discern from its history. In fact, the only information provided in the explanation of this mandate is found in one simple sentence:

> "This section prohibits discrimination, exclusion or denial of benefits to otherwise qualified handicapped individuals by any program or activity receiving Federal financial assistance." 1973 U.S. Code Cong. & Ad. News at 2143.

Congress relied, apparently, on the assumption that Section 504 would be enforced as had previous civil rights legislation and, thus, set forth no language in the statute – itself – requiring rule making. There is no indication, therefore, that Congress ever intended to impose affirmative action obligations on all recipients of federal funds.

Enforcement provisions were, however, necessary. Thus, on April 28, 1976, President Ford ordered the then United States Department of Health, Education and Welfare (now Health and Human Services) to "establish standards for determining what are discriminatory practices

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[16]See 45 C.F.R. 84.55(b)(5).

within the meaning of § 504."[17] The Order charged the Department of Health and Human Services (HHS) with co-ordinating and implementing Section 504 and required other federal agencies to issue Section 504 regulations consistent with HHS standards.

The first set of regulations were issued on May 4, 1977, with an apparent attempt to fit the problem of discrimination against the handicapped into the model of the remedy for race discrimination, that one court likened it to "fitting a square peg into a round hole."[18] What followed as a consequence of this action was a plethora of new federal regulations designed to prevent discrimination on the basis of handicap in programs and activities receiving or benefitting from federal financial assistance.[19]

The instant case is concerned primarily with an overextension of the HHS regulatory powers pursued as such under the guise of implementing Setion 504 of the Rehabilitation Act through the promulgation of regulations designed to protect handicapped newborns from discri-

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[17]Executive Order No. 11,914, April 28, 1976, reported in 29 U.S.C. §294 (1976 Supp.), revoked by Executive Order No. 12, 250 issued Nov. 2, 1980, reprinted as a note to 42 U.S.C. §2000d-1 (1980 Supp.) at 199-200.

[18] Garrity v. Gullen, 522 F. Supp. 171, 206 (D.N.H. 1981).

[19]For applications of this regulations, see: Agency for International Development, 22 C.F.R. 217.1 (1984); Department of Agriculture, 7 C..F.R. 15b.1 (1985); Department of Commerce, 15 C.F.R. 8b.1 (1984); Department of Defense, 32 C.F.R. 56.1 (1984); Department of Education, 34 C.F.R. 104.1 (1984); Department of Health & Human Services, 45 C.F.R. 84.1 (1984); Department of Labor, 29 C.F.R. 32.1 (1984); 41 C.F.R. 29-70.100 (1984); Department of State, 22 C.F.R. 142.1 (1984); Department of Interior, 43 C.F.R. 17.200 (1984); National Endowment for the Humanities, 45 C.F.R. 1170.1 (1984); National Science Foundation, 45 C.F.R. 605.0 (1984); Veterans Administration, 38 C.F.R. 18.1 (1984).

mination in the delivery of health care services in hospitals receiving federal funds. Congress intended for HHS, as well as all other Departments and Agencies, to assist in assuring *access* for handicapped individuals to a variety of federally funded programs,[20] and not the *delivery* of health services.

In the stated purpose of the HHS regulations that are being challenged presently, it is recognized that they were promulgated to ostensibly implement Section 504 of the Rehabilitation Act, yet – interestingly – Infant Care Review Committees (ICRC) – were advocated as a means to ". . . assist in making decision concerning medically beneficial treatment in specific cases." 45 C.F.R. 84.55. Nowehere in its history has Section 504 been interpreted as extending an invitation for federal intervention into the medical decision making process for infants or anyone else. These regulations clearly go beyond the scope of implementing Section 504 which was, originally, enacted to assure *access* to programs (including medical care in federally funded hospitals) but *not to force treatment* by a federal government procedure of intervention into the medical decision making process.

It is recognized that an administrative agency is only empowered to make rules consistent with the authority granted it by a particular grant of statutory delegation.[21] When regulations and rules are made outside the statutory power conferred, they are to be challenged as being *ultra vires.*[22] And, thus, the actions of Margaret M. Heckler, the Secretary of Health and Human Services, in promul-

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[20]Drennon v. Philadelphia Gen. Hosp., 428 F.Supp. 809 (E.D. Pa. 1979).

[21]B. SCHWARTZ, ADMINISTRATIVE LAW §4.4 (2d ed. 1984).

[22]*Id.*

gating the regulations and interpretative guidelines at issue here on January 12, 1984,[23] are invalid inasmuch as they have no rational relationship to the governing statute — the Rehabilitation Act of 1973.

In *Southeastern Community College v. Davis,* 442 U.S. 397 (1979), the Court further clarified the purpose of Section 504. In holding that the plaintiff's rejection to nursing school on the basis of her hearing impairment was not protected by Section 504, the Court stated that the statutory mandate of providing access to federally funded programs and institutions is statutorily limited by the phrase, "an otherwise qualified" person. Moreover, the court found these implementing regulations should be written narrowly in such a manner so as not to constitute "an authorized extension of obligations by [that statute]."[24]

In addressing the issue of what reach HHS implementing regulations may have, the Court continued in *Southeastern* to state:

> "Although an agency's interpretation of the statute under which it operates is entitled to some deference, 'this deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose and history.' *Teamsters v. Daniel,* 439 U.S. 551, 556 n. 20 (1979). Here, neither the language, purpose nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds."[25]

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[23]49 Fed. Reg. 1622.

[24]442 U.S. 397, 410 (1979).

[25]*Id.* at 411.

Here, in the instant case, these HHS regulations continue to impose an affirmative action obligation on recipients that was not contemplated by Congress. The Court has maintained consistently that when "Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State Hospital v. Halderman,* 451 U.S. 1, 17 (1981). To the extent that Section 504 is involved, Congress has made no such mandate.

II. INASMUCH AS THE STATES HAVE ALREADY ENACTED CHILD ABUSE AND PROTECTION LEGISLATION, THE REGULATIONS AND INTERPRETATIVE GUIDELINES ENACTED BY THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES IN THIS AREA OF CONCERN, ARE UNNECESSARY, REDUNDANT AND INTRUSIVE.

The Congressional mandate for affirmative action conduct which is not found in Section 504 of the 1973 Rehabilitation Act is found in each state's Child Abuse Prevention Acts[26] as well as the Federal Child Abuse Prevention and Treatment Act, 42 U.S. § 5101 (1982). These enactments impose a standard of affirmative action conduct on the part of the individuals and institutions to report incidents of child abuse and/or neglect. The Indiana legislation in this area is illustrative of the extent to which affirmative action is required in that it imposes a duty to report upon "any individual who has reason to believe that a child is a victim of child abuse or neglect. . . ." IND.CODE ANN. § 31-6-11-3 (Burns 1980). In addition to these protections that are afforded infants, the medical profession – itself – imposes a self-regulatory duty upon

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[26] *Supra* note 14.

its physicians to maintain respect for all human life through adherence to the Hippocratic Oath.[27]

The federal government assistance in this area is more than adequate to safeguard the health and welfare of its citizens and prevent discrimination.[28] Additionally, pursuant to Sections 1152(a) and 1154 of the Social Security Act, (42 U.S.C. §§ 1302, 1320c-4(a)(7) (1982), HHS has established the Professional Standards Review Organization for the purpose of reviewing the work of both physicians and hospitals. 42 C.F.R. 463, 466.

A. UNDER THE DOCTRINE OF FEDERALISM, IT IS FOR THE STATE AND THE FEDERAL GOVERNMENTS TO REACH A FLEXIBLE ACCOMMODATION OF MUTUAL INTERESTS IN THE FIELD OF HEALTH CARE AND MAINTENANCE. THIS ACCOMMODATION HAS BEEN ACHIEVED WITHOUT THE NEED OR REFERENCE TO THE CHALLENGED SECTION 504 REGULATIONS.

At the constitutional level, absolutes are needed not only to preserve greater aspirations and ideals, but to "keep us from foolhardy action where wrong results really matter."[29] There is no greater aspiration or ideal than that seen in the principles of creative federalism whereby the

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[27]Oath of Hippocrates, 5th Century B.C. as reprinted in J. KATZ, EXPERIMENTATION WITH HUMAN BEINGS 311 (1972). See also, the re-formulation of the Oath by the World Medical Association in KATZ, at 312.

[28]*Supra* note 19.

[29]G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 179 (1982).

state and the federal government achieve "a flexible and dynamic accommodation of conflicting interests."[30]

The maintenance of health care service and the assurance of accessibility to those services without discrimination to the users is a first line responsibility of the states. And, to their credit, they have in the past, and continue so today, through various specific legislative programs, to provide both non-discriminatory access to health care services for all – regardless of age or mental or physical handicap.[31] And, the federal government, much to its credit, has mandated that all federally funded health care facilities provide non-discriminatory *access* to these facilities,[32] and – furthermore – that there be no discrimination on the basis of handicap in programs and activities receiving or benefiting from federal financial assistance.[33] It is here, then a "flexible accommodation" is both met and achieved between the states and the federal government without any offensive intrusion by one into the other.

In *United States v. University Hospital, State University of New York at Stony Brook, et al.*, Circuit Judge Pratt, writing for the majority, stated that no presumption could

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[30]O'Connor, Our Judicial Federalism, 35 CASE W. RES. L. REV. 1, 12 (1984-85).

The concept of "our federalism," observed Mr. Justice Hugo Black, is that it is "a system in which there is sensitivity to the legitimate interest of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the State." *Younger v. Harris,* 401 U.S. 37 (1971).

[31]*Supra* note 14.

[32]See 50 Fed. Reg. 14878 (April 15, 1985); Federal Child Abuse Prevention and Treatment Act, 42 U.S.C. §5101 et seq. (1982).

[33]*Supra* note 19.

be indulged which allowed Congress, in enacting Section 504,

> "to enter the field of child care, which, as HHS has recently acknowledged, has traditionally been occupied by the states. See 49 Fed. Reg. 1626-27, 1629-31; 48 Fed. Reg. 9630. Had Congress intended to displace state police power functions, it surely would have made that intention explicit."[34]

On January 9, 1985, a unanimous decision by the United States Supreme Court acknowledged that:

> "In enacting the Rehabilitation Act and in subsequent amendments, Congress did focus on several substantive areas – employment, education, and the elimination of physical carriers to access – in which it considered the societal and personal costs of refusals to provide meaningful access to the handicapped to be particularly high. But nothing in the pre- or post-1973 legislative discussion of § 504 suggests that Congress desired to make major inroads on the States' longstanding discretion to choose the proper mix of amount, scope and duration limitation on services. . . ." *Alexander et al. v. Choate et al.*, ____ U.S. ____, 105 S. Ct. 712, 724 (1985).

B. SOUND PRINCIPLES OF JUDICIAL AND LEGISLATIVE INTERPRETATION DIRECT A NEGATION OF THE PRESENT SECTION 504 REGULATIONS AND INTERPRETATIVE GUIDELINES.

While the original Constitution was concerned with – essentially – developing and ensuring mechanisms for

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[34]729 F.2d 144 160 (2d Cir. 1984).

democratic choice, today constitutional scholarship "is dominated by the creation of arguments that will encourage judges to thwart democratic choice."[35] Consequently, it remains for the modern court to strive to both grasp and to understand the distinctive meaning of statutory words as they are set out in their own individual context – with full reference to the documented processes that produced them.[36]

Judicial construction should adhere to what has been said by the legislature and "not draw prodigally upon unformulated purposes or directions."[37] Indeed, it has been posited that the major – if not sole – task for a contemporary judge is to avoid the infusion of extra-constitutional moral and political norms into his deliberative processes;[38] and, rather, to seek and thereby translate the legislative morality of a questioned statute into a practical rule.[39]

The doctrine of *casus omissus* is clear: if a legislative omission occurs within a statute, causing a resulting gap, a court can neither supply the omission nor fill the gap.[40] The clarity of this doctrine goes to underscore the responsibility of the judiciary to follow a path of strict construc-

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[35]Bork, Tradition and Morality in Constitutional Law at 9 (1984), The Francis Boyer Lecture on Public Policy, American Enterprise Institute, Washington, D.C.

[36]J. HURST, DEALING WITH STATUTES 65 (1982).

[37]Frankfurter, A Symposium on Statutory Construction, 3 VAND. L. REV. 265, 367 (1950).

[38]*Supra* note 35 at 3.

[39]*Id.* at 11.

[40]R. DICKERSON, THE INTERPRETATON AND APPLICATION OF STATUTES 216 (1975).

tion – especially so when the meaning of a questioned statutory text is plain, clear or unambiguous.[41]

It is patently clear from the words of the Rehabilitation Act of 1973 – let alone the legislative history – that both the Act, and in particular Section 504, have no concerns with the treatment of handicapped newborns in federally funded hospitals. Even if there were to have been a legislative omission here (of which there was none), the Court is restrained from providing corrective assistance.

In analyzing the post enactment legislative history of Section 504, Circuit Judge Pratt found unequivocal indications that,

> "congress was primarily concerned with affording the handicapped access to federally-funded programs and activities, and that Congress never envisioned that HEW (or HHS) would attempt to apply section 504 to treatment decisions." *United States v. University Hospital, State University of New York at Stony Brook, et al.*, 729 F.2d 144, 159 (2d Cir. 1984).

Mr. Justice Marshall, writing for a unanimous Court, stated that when seeking an interpretation of Section 504, two "countervailing considerations" need to be understood and be responded to properly: "the need to give effect to the statutory objective and the desire to keep § 504 within manageable bounds." *Alexander et al. v. Choate et al.*, ___ U.S. ___, 105 S. Ct. 712, 720 (1985).

> "Given the legitimacy of both of these goals and the tensions between them, we decline the parties' invitation to decide today that one of these goals so overshadows the other as to be

[41]C. SANDS, 2A STATUTES AND STATUTORY CONSTRUCTION §46.04 (4th ed. 1973).

eclipsed." *Alexander et al., supra,* at 105 S. Ct. 712, 720 (1985).

Both the stated objects of the Rehabilitation Act of 1973 and the scope of Section 504 of that Act would be thwarted and made *totally unmanageable* by the validation of the regulations and interpretative guidelines issued by Secretary Heckler in this present appeal.

III. THE FAMILIAL RIGHT OF PRIVACY ALLOWS FOR A CO-ORDINATE RIGHT OF PARENTS TO MAKE JUDGMENTS REGARDING THE HEALTH AND WELL-BEING OF THEIR MINOR CHILDREN ACCORDING TO A STANDARD OF REASONABLENESS OR WHAT, TRADITIONALLY IS IN THE BEST INTERESTS OF THE CHILD.

The preservation of the family unit has been recognized as an important societal goal[42]; and a worthy and proper area for the state to undertake efforts to ensure that children are raised in a stable and traditional family setting.[43] Indeed, substantial evidence suggests that it is in a child's best interest to have a family.[44] Thus, even though the most universal relation in nature is to be found between parent and child there is a discernible modern legislative trend toward replacing the traditional deference to parental authority, with a new emphasis on child welfare.[45]

In 1973, the dominant judicial attitude in settling disputes conc ning children was to inquire whether the

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[42]Quillon v. Walcott, 98 U.S. 549, 555 (1978).

[43]Smith & Iraola, Sexuality, Privacy and The New Biology, 67 MARQ. L. REV. 263, 290 (1984).

[44]L. TRIBE, AMERICAN CONSTITUTIONAL LAW 84 (1979 Supp.).

[45]Dickens, The Modern Function and Limits of Parental Rights, 97 L.Q. REV. 462 (1981).

best interest or welfare of the child would be served. In 1979, however, a neo-conservative attitude was advocated, and is gaining respect, which directs judicial restraint and discourages state intervention when "children issues" arise.[46] As one commentator has observed, state intervention must be tempered: "so long as the child is part of a viable family, his own interests are merged with those of the other members. Only after the family fails in its function should the child's interests become a matter for State intrusion."[47] Thus, before a child's interest can be protected individually, the government must make a showing that the parent or parents are operating in a fashion that is not consistent with principles of family solidarity and privacy.[48]

Modern parents, under the neo-conservative standard, should exercise autonomy over the medical needs of their children. The crucial task is to locate the point at which parental choices so harm the child's welfare as to justify state intervention. It has been suggested that unless death is a likely consequence of the parental decision, there is no justification for governmental intrusion. An ameliorated position could state that only unreasonable parental actions warrant intervention. Introducing the standard of reasonableness gives wider significance and respect to parental autonomy. It is also a more realistic approach to decisional matters in this area.[49]

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[46]*Id.* at 467.

[47]J. GOLDSTEIN, A FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 130 (1973).

[48]*Supra* note 45.

[49]Smith, Quality of Life, Sanctity of Creation: Palliative or Apeotheosis?, 63 NEB. L. REV. 709 (1984).

The standard of reasonableness is always flexible and responsive to individual factual applications. This flexibility may be enhanced through interpretation and application of social policies emerging from each particular situation. Forces of reasonableness and social policy are balanced as justice or equity is sought in individual cases. The element of reasonable discretion must be accorded to the family in its unique position of knowledge. Determinations of the best interests of one family member must by necessity be based upon individual family beliefs in social, economic, and spiritual values. Each case must be considered individually, according to the context in which it arises.[50]

When a parent exceeds the standard of reasonable conduct regarding a newly born handicapped infant, decisive action should be taken by the state to protect the infant. An inherent sense of conscience, decency, or humaneness directs all loving parents. This assumes, of course, that the parents are themselves intelligent and contributing members of society. Obviously, in those cases where the parents are not competent members of society, the state must stand ready to pierce the familial veil of privacy where the parents are incapable of making mature, reasonable, and loving judgments regarding the medical treatment of their newborn. One could, for example, well imagine a case of a fourteen-year-old, drug dependent, and economically insecure young girl giving birth to a neonate. Due to her illness, modest economic circumstances, and lack of sophistication, such a mother may decide to try to prevent heroic measures from being undertaken on an infant determined "salvageable" by her attending physi-

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[50] *Id.* at 730.

cians. In this situation, the state would be justified – indeed, compelled – to act. Similarly, when confused religous purposes supposedly "compel" parents to withhold emergency blood transfusions or surgical interventions, the state must intervene to protect the infant.[51]

While familial self-determination cannot remain unfettered and unchallenged, intrusions by the state should only be tolerated when familial judgment – based upon consultation with wise and faithfully objective medical providers – "so exceeds the limits of reason" that the best interests of the incapacitated member are being flagrantly disregarded.[52] Stated conversely, a parent will be considered *prima facie* inadequate when he or she suffers a disabling mental illness, retardation, drug addiction, or major character defect. These criteria evince an objectivity that has been lacking in past judicial evaluations, which were based on the best interests of the child.[53]

A. THE CONTEMPORARY RIGHT OF PRIVACY ALLOWS FOR THE WITHHOLDING OF INFORMATION WHICH ONE DOES NOT CHOOSE TO RELEASE.

Mr. Justice Stevens, writing for a unanimous Court in *Whalen v. Roe,* 429 U.S. 589 (1977), endeavored to define the constitutional right of privacy by suggesting that it embraced not only a general "individual interest in avoiding

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[51] *Id.* at 731.

[52] McCormick, To Save or Let Die: The Dilemma of Modern Medicine, in HOW BRAVE A NEW WORLD at 378 (R. McCormick, ed. 1981). See generally, Smith, The Plight of The Genetically Handicapped Newborn: A Comparative Analysis, 9 HOLDSWORTH L. REV. 164 (1984).

[53] *Supra* note 49 at 731.

disclosure of personal matters" but a distinct "interest in independence in making certain kinds of important decisions."[54] In his Opinion, the Justice focuses not so much upon a general right of control of personal information as upon a very narrowly formulated right to withhold information.[55]

Over fifty-seven years ago, an equally erudite member of the Court, Mr. Justice Brandeis, stated – in reference to structuring a privacy right – that, "They [the makers of the Constitution] conferred, as against the government, the right to be left alone – the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States,* 277 U.S. 438, 478 (1928).

Surely there is no more greater validation of a contemporary right of privacy as articulated by Mr. Justice Stevens than of the right of independence to withhold information from outside or third party interests in matters of familial health care. Decisions to pursue a particular modality of medical treatment or to decline treatment – absent a showing of child abuse or neglect when dealing with minors – are conducive to stabilizing a family environment. Section 504 of the Rehabilitation Act is an improper grant of authority for the regulations considered here that abridge the rights of familial autonomy and privacy by precluding the withholding of personal hospital records from federal governmental inspection and disclosure and furthermore invade the privacy of the doctor-patient relationship.

It is only when the states and the federal government are both willing and able to provide for adequate funding and

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[54]Whalen v. Roe, 429 U.S. 589, 599-600 (1977).

[55]L. TRIBE, AMERICAN CONSTITUTIONAL LAW 888 (1978).

support necessary to meet a standard of reasonable and proper care for severely handicapped children, that parental autonomy and privacy should be invaded and truly compromised (except to the extent that such exercises of privacy are subject presently to the state child abuse and neglect laws).[56]

CONCLUSION

Because of the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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September 30, 1985.

The *amicus curiae* wishes to acknowledge the assistance of Scott E. Squillace, a student at The Catholic University Law School.

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[56]Murray, The Final, Anticlimatic Rule on Baby Doe, HASTINGS CENTER REPORT 5 (June 1985). See also, Smith, Defective Newborns and Government Intermeddling, 25 MED. SCI. & LAW 44 (1985).